

**ELECTION SYSTEMS & SOFTWARE, INC.
ELECTION SERVICES AGREEMENT**

This Agreement is made effective as of January 1, 2010 (the "Effective Date"), unless both parties fail to sign before that time.

BETWEEN: Election Systems & Software, Inc., a Delaware corporation ("ES&S");

AND: State of North Dakota, acting through the Secretary of State ("Customer")

RECITALS:

- A. Customer has agreed to purchase certain election-related services from ES&S for use in North Dakota's 53 Counties (the "Jurisdiction"). The terms and conditions under which such services shall be provided are set forth in the **GENERAL TERMS** attached hereto.
- B. The following Exhibits are incorporated into, and constitute an integral part of, this Agreement (check all that apply):

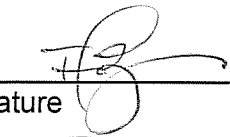
 X Exhibit A (Ballot Layout, Coding, and Voice File Services)

 X Exhibit B (Ballot Printing Services)

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, each of the parties hereto:

- Agrees to the **GENERAL TERMS** and the terms and conditions set forth in each Exhibit.
- Agrees that at all times, this Agreement shall be governed by and construed in accordance with the laws of the **State of North Dakota**.
- Represents and warrants to the other party that as of its signature date indicated below it has full power and authority to enter into and perform this Agreement, and that the person signing below on its behalf has been properly authorized to execute this Agreement.
- Acknowledges that it has read this Agreement, understands it and intends to be bound by it.

ELECTION SYSTEMS & SOFTWARE, INC.
11208 John Galt Boulevard
Omaha, NE 68137
Fax No.: (402) 970-1291



Signature

T. Houder O'Brien

Name (Printed or Typed)

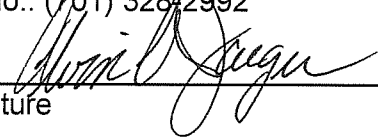
CFO

Title

12/18/09

Date

STATE OF NORTH DAKOTA, ACTING
THROUGH THE SECRETARY OF STATE
600 East Boulevard Avenue, Dept. 108
Bismarck, ND 58505-0500
Fax No.: (701) 328-2992



Signature

Alvin A. Jaeger

Name (Printed or Typed)

Secretary of State

Title

12/30/09

Date

GENERAL TERMS AND CONDITIONS

1. **Consideration.** The consideration to be paid by Customer to ES&S for the services provided hereunder is set forth on the accompanying Exhibits.

2. **Limitation of Liability.** Except for claims for direct loss resulting from personal injury (including death) and damage to real property and tangible personal property, ES&S' total liability to Customer arising out of or relating to this Agreement will not exceed the aggregate amount paid under this Agreement. Neither party will be liable for any indirect, incidental, punitive, exemplary, special or consequential damages of any kind whatsoever arising out of or relating to this Agreement. Any action by Customer against ES&S shall be commenced within the applicable statutory period of limitations after the cause of action has accrued. By entering into this Agreement, Customer agrees to accept responsibility for the selection of, use of and results obtained from any services not provided by ES&S.

3. **Excusable Nonperformance.** Except for a delay or failure in the payment of money, if either party is delayed or prevented from performing its obligations under this Agreement due to any cause beyond its reasonable control, including natural disaster, fire, flood, unusually severe weather, terrorism, insurrection, war, Acts of God, labor disputes and governmental regulations, the delay shall be excused during the continuance of, and to the extent of, such cause, and the period of performance shall be extended to the extent necessary to allow performance after the cause of delay has been removed. ES&S agrees to work with Customer, at Customer's request, to develop mutually agreeable alternatives in order to minimize the negative impact of any such delay.

4. **Exclusive Service Provider.** Customer hereby agrees to purchase the products and services set forth on Exhibits A and B attached hereto from ES&S for the Term of this Agreement at the pricing set forth on each applicable Exhibit. Customer's agreement to purchase all of such products and services from ES&S for the entire Term entitles Customer to receive the preferred pricing for each product or service as provided herein. In the event that Customer terminates its purchase commitment for one or more of the products and services set forth on Exhibits A and B prior to expiration of the Term of this Agreement for any reason other than for cause pursuant to Section 5 of this Agreement, or purchases any such products or services from a provider other than ES&S during the Term, or fails to pay for such products or services provided by ES&S pursuant to the payment terms in Exhibit A and B, during the Term, Customer shall no longer be entitled to receive the pricing set forth on Exhibits A and B, as applicable, and shall pay ES&S its then current rates for such product and services. As of the Effective Date of the Agreement, pursuant to the request and approval of the State, ES&S has engaged Synergy Graphics, Inc. ("Synergy") as its subcontractor to perform some or all of the Services set forth hereunder. ES&S shall use commercially reasonable efforts to continue to engage Synergy to perform such Services; however, ES&S will not guarantee that Synergy will provide some or all of the Services throughout the entire Term of the Agreement. ES&S, in consultation with Customer

may, determine who will provide the Services contemplated hereunder to the Customer. In the event that ES&S determines it is necessary to engage an alternative subcontractor to perform some or all of the Services performed by Synergy, ES&S agrees to notify the State of such action and work with the State to attempt to identify a mutually acceptable alternative subcontractor. In the event that ES&S reasonably determines it is necessary to terminate the engagement of Synergy, such termination shall not be a default under this Agreement.

5. **Term; Termination.** This Agreement shall be in effect for a four-year period commencing on the Effective Date, provided that the parties execute this Agreement with an Effective Date that is on or before January 1, 2010. In the event the parties are unable to execute this Agreement with an Effective Date that is on or before January 1, 2010, this Agreement shall be void and neither party shall have any obligations with respect to the subject matter herein. In accordance with the foregoing, this Agreement shall apply to all elections within the Jurisdiction beginning sixty (60) days after the Effective Date (the "Term") through December 31, 2013. This Agreement may be terminated, in writing, at any time by either party if the other party breaches any material provision hereof and does not cure such breach within thirty (30) days after it receives written notification thereof from the non-breaching party. Customer may terminate this Agreement effective upon delivery of written notice to ES&S, or on any later date stated in the notice, under any of the following conditions:

- a. If funding from federal, state, or other sources is not obtained and continued at levels sufficient to allow for purchase of the services or supplies in the indicated quantities or term; provided, however, that this Section 5.a shall not be construed so as to permit Customer to terminate this Agreement in order to acquire some or all of the services provided hereunder from a third party. The Agreement may be modified by agreement of the parties in writing to accommodate a reduction in funds.
- b. If federal or state laws or rules are modified or interpreted in a way that the services are no longer allowable or appropriate for purchase under this Agreement or are no longer eligible for the funding proposed for payments authorized by this Agreement.
- c. If any license, permit or certificate required by law or rule, or by the terms of this Agreement, is for any reason denied, revoked, suspended or not renewed.

Termination of this Agreement under this subsection is without prejudice to any obligations or liabilities of either party already accrued prior to termination. Upon termination, Customer shall pay ES&S for all services performed pursuant to Exhibits A and B up to the date of termination. The amount of such payment may be paid from any appropriations available for such purposes, and Customer's highest-ranking officer or official shall use his/her best efforts to timely and sufficiently request the appropriation necessary to pay such amount.

In no event shall Customer be entitled to any refund or any form of credit for amounts already paid hereunder in the event Customer terminates this Agreement in accordance with Sections 5.a. or 5.b. above.

6. **Assignment.** Except in the case of a sale, transfer or assignment of all or substantially all of the assets of ES&S to a successor who has asserted its intent to continue the business of ES&S, neither party may assign or transfer this Agreement or assign any of its rights hereunder without the prior written consent of the other party hereto, such consent not to be unreasonably withheld.

7. **Entire Agreement.** This Agreement, including all Exhibits hereto (all of which are incorporated herein by this reference), contains the entire agreement of the parties with respect to the subject matter hereof and shall supersede and replace any and all other prior or contemporaneous discussions, negotiations, agreements or understandings between the parties, whether written or oral, regarding the subject matter hereof. Any provision of any purchase order, form or other agreement which conflicts with or is in addition to the provisions of this Agreement shall be of no force or effect. In the event of any conflict between a provision contained in an Exhibit to this Agreement and these General Terms, the provision contained in the Exhibit shall control. No waiver, amendment or modification of any provision of this Agreement shall be effective unless in writing and signed by the party against whom such waiver, amendment or modification is sought to be enforced. No consent by either party to, or waiver of, a breach by either party shall constitute a consent to or waiver of any other different or subsequent breach by either party.

8. **Notice.** Any notice or other communication required or permitted hereunder shall be in writing, and will be deemed given when delivered personally, sent by confirmed fax, sent by commercial overnight courier (with written verification of receipt) or sent by registered or certified mail, return receipt requested, postage prepaid, when the return receipt is received. All communications shall be sent to the attention of the persons listed on the signature page to this Agreement and at the addresses or fax numbers set forth on such signature page unless other names, addresses or fax numbers are provided by either or both parties.

9. **Disputes.**

Remedies for Past Due Payments. If any payment to ES&S is past due more than thirty (30) days, ES&S may suspend performance under this Agreement until such amount is paid.

Dispute Resolution Process. Time is of the essence in resolving disputes. The initiating party shall notify the responding party of any dispute, including all relevant information (e.g., the nature of the dispute, dates, times, persons involved). The responding party shall respond to the notification within five (5) business days. Thereafter, the parties shall use their good faith efforts to resolve the dispute within a reasonable period of time. Notwithstanding anything

in this Section 9 to the contrary, either party may apply to any court having jurisdiction over the subject matter of the dispute for a temporary restraining order, preliminary injunction, or other appropriate legal remedy at any time.

10. **Severability.** If any term of this Agreement is declared by a court having jurisdiction to be illegal or unenforceable, the validity of the remaining terms must not be affected, and, if possible, the rights and obligations of the parties are to be construed and enforced as if the Agreement did not contain that term.

11. **Spoliation - Notice of Potential Claims.** ES&S agrees to promptly notify Customer of all potential claims that arise or result from this Agreement. ES&S shall also take all reasonable steps to preserve all physical evidence and information that may be relevant to the circumstances surrounding a potential claim, while maintaining public safety, and grants to Customer the opportunity to review and inspect the evidence, including the scene of an accident.

12. **Indemnification.** Except as may otherwise be provided in Section 2 of this Agreement, Customer and ES&S each agrees to assume its own liability for any and all claims of any nature including all costs, expenses and attorneys' fees which may in any manner result from or arise out of this Agreement.

13. **Insurance.** ES&S shall secure and keep in force during the term of this Agreement, from insurance companies, government self-insurance pools or government self-retention funds, authorized to do business in North Dakota, the following insurance coverages:

- a. Commercial general liability, including premises or operations, contractual, and products or completed operations coverages (if applicable), with minimum liability limits of \$250,000 per person and \$1,000,000 per occurrence.
- b. Professional errors and omissions, including a three-year "tail coverage endorsement," with minimum liability limits of \$1,000,000 per occurrence and in the aggregate.
- c. Automobile liability, including owned (if any), hired, and non-owned automobiles, with minimum liability limits of \$250,000 per person and \$500,000 per occurrence.
- d. Workers compensation coverage meeting all statutory requirements.

The insurance coverages listed above must meet the following additional requirements:

- a. Any deductible or self-insured retention amount or other similar obligation under the policies shall be the sole responsibility of ES&S. The amount of any deductible or self-retention is subject to approval by Customer.
- b. This insurance may be in policy or policies of insurance, primary and excess, including the so-called umbrella or catastrophe form and must be placed with insurers rated "A-" or better by A.M. Best Company, Inc., provided any excess policy follows form for coverage. Less than an "A-" rating must be approved by Customer. The policies shall be in form and terms approved by Customer.
- c. The insurance required in this Agreement, through a policy or endorsement, shall include a provision that the policy and endorsements may not be canceled or modified without thirty (30) days' prior written notice to the undersigned Customer representative.
- d. ES&S shall furnish a certificate of insurance to the undersigned Customer representative prior to commencement of this Agreement.
- e. Failure to provide insurance as required in this Agreement is a material breach of contract entitling Customer to terminate this Agreement immediately.

14. **Confidentiality.** ES&S agrees not to use or disclose any information it receives from Customer under this Agreement that Customer has previously identified as confidential or exempt from mandatory public disclosure except as necessary to carry out the purposes of this Agreement or as authorized in advance by Customer. Customer agrees not to disclose any information it receives from ES&S that ES&S has previously identified as confidential and that Customer determines in its sole discretion is protected from mandatory public disclosure under a specific exception to the North Dakota open records law, N.D.C.C. § 44-04-18. The duty of Customer and ES&S to maintain confidentiality of information under this section continues beyond the term of this Agreement, or any extensions or renewals of it.

15. **Compliance with Public Records Law.** ES&S understands that, except for disclosures prohibited in Section 14, Customer must disclose to the public upon request any records it receives from ES&S. ES&S further understands that any records that are obtained or generated by ES&S under this Agreement, except for records that are confidential under Section 14 may, under certain circumstances, be open to the public upon request under the North Dakota open records law. ES&S agrees to contact Customer immediately upon receiving a request for information under the open records law and to comply with Customer's instructions on how to respond to the request.

16. **Work Product, Equipment and Materials.** All work product, equipment or materials created or purchased and actually paid for by Customer under this Agreement belong to Customer and must be delivered to Customer at Customer's request upon termination of this Agreement. ES&S agrees that all materials prepared under this Agreement that were not previously created by ES&S for use in performing this Agreement are "works for hire" within the meaning of the copyright laws of the United States and assigns to Customer all rights and interests ES&S may have in the materials it specifically prepares for Customer as part of ES&S' performance under this Agreement, including any right to derivative use of the material. ES&S shall execute all necessary documents to enable Customer to protect its rights under this section.

17. **Independent Entity.** ES&S is an independent entity under this Agreement and is not a Customer employee for any purpose, including the application of the Social Security Act, the Fair Labor Standards Act, the Federal Insurance Contribution Act, the North Dakota Unemployment Compensation Law and the North Dakota Workers' Compensation Act. In addition, ES&S shall not be deemed to be a "state actor" for purposes of 42 U.S.C. § 1983. ES&S will not be responsible for (a) user errors, (b) voter errors or (c) problems encountered by any individual in voting. ES&S may, with the consent of Customer, engage subcontractors to provide certain of the services, but shall remain fully responsible for such performance. ES&S retains sole and absolute discretion in the manner and means of carrying out ES&S' activities and responsibilities under this Agreement, except to the extent specified in this Agreement.

18. **Nondiscrimination and Compliance with Laws.** ES&S agrees to comply with all applicable laws, rules, regulations and policies, including those relating to nondiscrimination, accessibility and civil rights. ES&S agrees to timely file all required reports, make required payroll deductions, and timely pay all taxes and premiums owed, including sales and use taxes and unemployment compensation and workers' compensation premiums. ES&S shall have and keep current at all times during the term of this Agreement all licenses and permits required by law.

19. **State Audit.** All records, regardless of physical form, and the accounting practices and procedures of ES&S relevant to this Agreement are subject to examination by the North Dakota State Auditor or the Auditor's designee. ES&S will maintain all such records for at least three years following completion of this Agreement.

20. **Taxpayer ID.** Election Systems & Software, Inc's federal employer ID number is: 47-0617567.

21. **Payment of Taxes by State.** Customer is not responsible for and will not pay local, state, or federal taxes. State sales tax exemption number is E-2001, and certificates will be furnished upon request by the purchasing agency.

22. **Survival.** The provisions of Sections 1-6, 12, 14, 15, 16, 17 and this Section 22 shall survive the termination of this Agreement, to the extent applicable.

23. **Effectiveness of Agreement.** This Agreement is not effective until fully executed by both parties.

[END OF GENERAL TERMS]

EXHIBIT A
BALLOT LAYOUT, CODING, AND VOICE FILE SERVICES

1. **Services.** The services to be provided by ES&S, a description of such services, and per unit fees are set forth below. Customer acknowledges that ES&S' fees for these services are based on (a) a commitment by Customer to subscribe to such services for a period of at least four (4) years, and (b) the descriptions listed in the table below. A change in the Customer's commitment to a period of less than four (4) years for any reason other than a termination for cause pursuant to Section 5 or due to termination for lack of funding or authority as provided in Section 5 of this Agreement will result in a change in the fees set forth below. Notwithstanding the foregoing, ES&S may increase the per unit fees in years 2011, 2012, and 2013 by not more than 5% of the amount of the most recent per unit fees paid by Customer.

Election Systems & Software Ballot Layout, Coding, Voice File Service Pricing	
Covered Elections: See Section 5 of the General Terms	
	Per Unit Fee
Paper Ballot Layout	
English and Spanish (combined):	
1 to 500 Faces	\$15.00
501 or more Faces	\$12.50
Languages other than English/Spanish	
1 to 500 Faces, per Language	\$30.00
501 or more Faces, per Language	\$25.00
Base Charge for Ballot On Demand (BOD)	\$422.10
Electronic Screen Layout - AutoMARK and iVotronic	
English and Spanish (combined):	
Per Ballot Style, or precinct, whichever is greater	Included
Languages other than English/Spanish	
Per Ballot Style, or precinct, whichever is greater	Included
Programming Services	
Base Charge per Equipment Type	\$371.88
Base Charge for ERM file set-up	\$371.88
Ballot types (open primary or multiple-page ballots)	\$53.13
Precincts (every precinct in the election)	\$5.31
Ballot faces (every unique face in the election)	\$10.63
Contests / Issues (total number of contests, referenda, questions / propositions in the election)	\$12.75
Candidate / Responses (total number of candidates &/or responses, including referenda and all write-ins for each contest/issue)	\$5.31
Headers (Central Tabulators)	\$1.49
Re-Coding Fees	\$371.88 + applicable fee for each changed element
Voice Files per iVotronic and AutoMARK Equipment Type	
Language Setup Charge - English	\$256.50

Election Systems & Software Ballot Layout, Coding, Voice File Service Pricing	
Covered Elections: See Section 5 of the General Terms	
Language Setup Charge - Spanish	\$256.50
Language Setup Charge - All Other languages	\$387.00 per language
Political Parties	\$5.22
Ballot Faces	\$10.53
Contests / Issues	\$10.53
Candidates / Yes-No Responses	\$7.29
Propositions / Amendments / Instructions	\$15.48
Price per word in excess of 1200 total words (Instructions / Propositions / Amendments)	\$0.27
Resubmission	\$256.50 for English & Spanish and \$387.00 (for each additional language), plus the applicable fee for each element changed for each language
Other Services (Standard Overnight Delivery Charges Will Apply and Will Be Billed Separately)	
Media burn (Flash / PCMCIA Cards, Mem Packs, PEBs, and Jump Drives)	\$10.00
Electronic transfer files (one charge per county, per election)	\$125.00
SOS Media	\$50.00

Note 1: Any applicable state and local taxes are not included, and are the responsibility of Customer.

Note 2: Payment terms are 100% of invoice total due within 30 calendar days of invoice date.

[END OF EXHIBIT A]

**EXHIBIT B
BALLOT PRINTING SERVICES**

Description	Price per Ballot
14" and 17" Ballots:	
Base ballot charge	\$0.25
Backside of ballot	\$0.03
Stub and / or numbering	\$0.03
Folding	\$0.02
Scoring	\$0.02
Packaging	\$0.01
Color requirements -- defined as a color bar on the ballot. Other designs or methods quoted separately.	\$0.02
Per Ballot Fee Subtotal	\$.xx
Additional charges for special requests, including watermarking, unique packaging requirements and expedited delivery requirements.	\$TBD
Per Ballot Fee Total	\$.xx
Prices are exclusive of freight, which will be billed separately.	
19" ballots are quoted separately.	

Note 1: 100% of payment for Ballot Printing services due within thirty (30) calendar days from issuance of invoice.

Note 2: The above pricing assumes the use of ES&S partner printers. The use of a Customer requested printer may result in a change in the fees outlined above.

Note 3: See Section 5 of the General Terms for covered elections.

Note 4: Backside of ballot and color fees will apply to all ballots printed no matter the number of precincts requiring these ballot features.

Note 5: ES&S may increase the per unit fees in years 2011, 2012, and 2013 by not more than 5% of the amount of the most recent per unit fees paid by Customer.